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Supreme Court, U.S.
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No. 94-1857

In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1994

HOWARD L. BEYER, Superintendent, and
W. CARY EDWARDS, Attorney General of New Jersey,

Petitioners,

v.

LAWRENCE L. SIMMONS,

Respondent.

MOTION FOR LEAVE FOR RESPONDENT LAWRENCE L. SIMMONS TO PROCEED IN FORMA PAUPERIS

Respondent Lawrence L. Simmons, through his attorney, John Vincent Saykanic, Esq., hereby moves for leave to proceed in forma pauperis. Mr. Saykanic was appointed under the Criminal Justice Act (18 U.S.C. Sec. 3006A(d)(6)) by the Honorable Dickinson R. Debevoise, U.S.D.J. and by the Third Circuit Court of Appeals. Mr. Simmons proceeded in forma pauperis in both the district court and in the court of appeals. Mr. Simmons is still indigent.

Dated: June 6, 1995

JOHN VINCENT SAYKANIC
Counsel for Respondent
Lawrence L. Simmons

No. 94-1857

IN THE

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OCTOBER TERM, 1994

HOWARD L. BEYER, Superintendent, and
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v.

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Respondent.

On Petition for Writ of Certioriari to the
United States Court of Appeals
for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June 6, 1995

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Third Circuit's decision extends the retroactivity rule beyond the limits of, and in conflict with, decisions of this court and announces a new rule?

2. Whether the Third Circuit's decision rejecting the state appellate court's decision under state substantive and procedural law conflicts with decisions of this Court?

3. Whether the Third Circuit's decision held that a Batson prima facie showing does not have to be borne by a defendant, and whether important and unresolved problems are raised?

4. Whether the petition for writ of certiorari must be denied since the Third Circuit reached its decision on an issue not even raised in the petitioners' petition?

LIST OF PARTIES

All parties are parties to this petition.

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ON PETITION FOR WRIT OF CERTIORARI TO
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FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Lawrence L. Simmons, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Howard L. Beyer and W. Cary Edwards.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 44 F.3d 1160 (3d Cir. 1995). The Third Circuit's opinion is reproduced in the Appendix to the petitioners' petition for Writ of Certiroari at p. 1a.

The order of the United States Court of Appeals for the Third Circuit is reported at 44 F.3d 1176 (3d Cir. 1995), and is reproduced in the petitioners' Appendix at p. 37a.

The opinion of the United States District Court, District of New Jersey, is reported at 796 F.Supp. 777 (D.N.J. 1992), and is reproduced in the petitioners' Appendix at p. 47a.

The opinion of the Superior Court of New Jersey, Appellate Division, has not been reported and is reproduced in the petitioners' Appendix at p. 92a.

The opinion of the United States District Court, District of New Jersey, is reported at 689 F.Supp. 432 (D.N.J. 1988), and is reproduced in the Petitioners' Appendix at p. 175a.

JURISDICTION

On January 4, 1995, the United States Court of Appeals for the Third Circuit filed its opinion and entered its judgment reversing the district court's denial of a writ of habeas corpus. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1254(1).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT XIV, SEC. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTERSTATEMENT OF THE CASE*

Respondent Lawrence L. Simmons ("respondent") wishes to point out to this Court that, although not stated in the petitioners' petition for writ of certiorari, there was virtually no evidence presented at the Simmons trial linking respondent to the murder of David Doktor, except for the testimony of David Wilson. Respondent emphasizes to this Court that, assuming arguendo the petitioners' facts are accepted, it was Donald Phillips, and not respondent, who struck Doktor in the head with the pipe, causing Doktor's death.

In Simmons, there was no physical or scientific evidence implicating respondent. No fingerprints linking him to the scene of the crime were found. No blood was found on his clothing or shoes. No witness for the State could identify respondent as being one of the perpetrators, save for David Wilson, the State's star witness.

At the Simmons trial, David Wilson testified that on the night of the murder he had been with Donald Phillips and respondent (who he just met that night) and the three decided to steal a car. (6T36-12 to 37-17). According to Wilson, on the way to steal the car the three observed Doktor descending the stairs of a house. According to Wilson's trial testimony, Phillips tapped respondent on the shoulder and said "let's get him." (6T50-22 to 55-4).

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* Pursuant to Rule 15.1, respondent points out perceived misstatements of fact and law in the petitioners' petition.

Wilson testified that respondent punched Doktor in the face, and Phillips proceeded to also punch Doktor in the face. (6T55-21 to 57-4). Doktor then "made a noise" and swung at Phillips, and Phillips punched his arm, breaking his wristwatch. Phillips (and not respondent) then removed plastic from his back pocket, wrapped it around his hands and then retrieve the pipe which he had secreted in a car and struck Doktor in the head a number of times. (6T57-5 to 25). Respondent allegedly removed Doktor's wallet from his back pocket, and the three ran. (6T59-3 to 61-9).

As Wilson testified at trial, it was Phillips, and not respondent, who struck Doktor in the head with the pipe, causing his death.

The entire State's case rested on the testimony of David Wilson, and he was given immunity in July of 1977 for the homicide of Doktor and the mugging of George Marshall. (6T75-8 to 76-5). At trial, Wilson at first refused to answer any questions on the grounds that it might incriminate him, and the trial judge entered an order compelling him to testify. (6T25-14 to 20; 6T29-8 to 19).

At trial, Wilson actually admitted that he would do anything to get a better deal for himself, and, if it suited his purpose to lie, he would lie. (7T38-10 to 25). While waiting to testify in the trial, Wilson claimed he had received a threatening note warning him not to testify for the State. After months of claiming he had received this note from one of the defendants at trial, Wilson admitted that he had actually written

the note to himself, in order to get a better deal. (7T33-11 to 38-13).

This is the witness upon which the Passaic County Prosecutor's Office based its entire murder case against respondent. As noted above, there was no other evidence linking respondent to the Doktor murder. At the new trial motion made on April 4, 1989, Bruno Mongiardo, the Assistant Prosecutor who tried the Simmons case, testified that in his opinion the government's case could not have even been submitted to a jury without David Wilson's testimony. (24T219-24 to 220-8).

Respondent testified at trial in his own defense and denied any involvement in the murder of Doktor, though he had admitted seeing Phillips and Wilson earlier that evening as respondent's sister, Wanda Addison, lived beneath Donald Phillips' mother's upstairs apartment. (10T11-22 to 23; 10T27-15 to 20; 10T30-13 to 15). Respondent was walking from his sister's house to his mother's house when the police questioned and arrested him. (10T19-11 to 14; 10T18-12 to 23-10). Respondent has to this day maintained his innocence in the Doktor murder.

Following the respondent's conviction and imprisonment, David Wilson recanted his trial testimony and testified under oath that he had lied when he had implicated respondent in the Doktor murder. Wilson testified at the recantation hearing that he had no knowledge concerning the death of David Doktor and that he had testified falsely because he had been told to lie by the Paterson Police Officers involved in the case, and he was afraid

of going to jail for life for the murder charge (for which he had been arrested). (23T55-20 to 56-25; 23T59-3 to 7). Wilson recanted his trial testimony because he had given his life to God and this is part of his confession, and he "could not live with it no more." (23T76-16 to 23).

While David Wilson had every reason to lie at the Simmons trial--his fear of being prosecuted for the Doktor murder (23T44-16 to 45-12; 23T55-20 to 56-25; 23T59-3 to 7), Wilson had every reason not to lie at the recantation hearing--namely, a possible perjury charge. (23T85-24 to 86-23).

At the recantation hearing, Bruno Mongiardo (who had tried the case for the State of New Jersey), testified that the "local police were lazy and were not completely open and forthright with me as to what they did on the investigation." (24T191-3 to 8).

In spite of this, respondent's new trial motions were denied and his convictions from 1977 stood until the Third Circuit Court of Appeals granted the writ in January of 1995.

Concerning the procedural history of this case, respondent points out that he had already petitioned this Court for certiorari in 1991, and this Court denied the petition for writ of certiorari (Lawrence Simmons v. New Jersey, No. 90-6999). (89a). Accordingly, this Court has already declined to address the issues in the case sub judice.

Respondent notes that the mandate in his case has been stayed by the Third Circuit until this petition is decided. (45a). Accordingly, respondent has not been permitted to have the

bail motion (which he filed immediately after the Third Circuit's decision in January of 1995) heard in state court due to a lack of jurisdiction. Accordingly, respondent at this time remains in prison without an opportunity for bail in spite of the fact that his conviction has been ruled unconstitutional.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. THE THIRD CIRCUIT DECISION DOES NOT EXTEND THE RETROACTIVITY RULE BEYOND THE LIMITS OF, AND IN CONFLICT WITH, DECISIONS OF THIS COURT AND DOES NOT ANNOUNCE A NEW RULE CONTRARY TO TEAGUE V. LANE

Petitioners claim that the court of appeals "has manufactured a new rule of retroactivity involving state appeals granted nunc pro tunc on federal collateral review." (Pb at p. 17).

Petitioners claim that "The criminal judgment in this case was final on February 6, 1985 for purposes of retroactivity analysis, as respondent had exhausted his state appellate remedies and the time for filing the petition had expired." (Pb 18). This claim by the petitioners is completely wrong, for respondent did not have his direct appeal decided by the New Jersey Superior Court, Appellate Division (the first appeal of his conviction) until July of 1990. (92a). The New Jersey Supreme Court then denied the petition for certification in October of 1990. (90A). This Court denied the petition for writ of certiorari on April 1, 1991. (89A).

Accordingly, since the respondent's direct appeal was not heard in state court until 1990, and the United States Supreme Court did not deny certiorari until 1991, the petitioners' claim that the criminal judgment was final in February of 1985 defies explanation. Even the Third Circuit in its decision concluded "Here, Simmons' 1977 conviction did not become final until 1991

when the United States Supreme Court denied his petition for a writ of certiorari. See Allen, 478 U.S. at 258 n. 1, 106 S.Ct. at 2880 n. 1 (citation omitted)." (6a).

As the Third circuit concluded:

> Although this case was before the Supreme Court in 1982, in conjunction with Simmons' efforts to get a direct appeal, it did not then become final in the relevant sense. Simmons' first appeal as of right was the critical missing step, and his intervening applications for collateral review did not render his conviction final. See Caspari v. Bohlen, __ U.S. __. 114 S.Ct. 948, 953 (1994). Accordingly, the Batson decision, announced in 1986, applies to this case." (6a).

In Allen v. Hardy, supra, this Court held that the decisions in Batson should not be applied retroactively on collateral review of convictions that became final before the opinion was announced. This Court, in footnote one, explained that "final" means that the judgment of conviction was rendered, the availability of appeal exhausted, and the time for the petition for certiorari had elapsed before the decision was in. Allen v. Hardy, supra, 106 S.Ct. at 2880.

In Caspari v. Bohlen, __ U.S. __, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), this Court held that in applying the Teague non-retroactivity rule to determine whether a habeas petitioner is seeking to benefit from a new rule of constitutional law, the court must first ascertain the date on which the petitioner's state court conviction and sentence became final. It must then survey the legal landscape as it existed at the time of the petitioner's conviction to determine whether the state court

considering petitioner's claim at that time would have felt compelled by existing precedent to conclude that relief was constitutionally required.

In Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), this Court held that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final.

The Third Circuit properly analyzed the case sub judice under this Court's decisions in Allen, Caspari, and Griffith (6a), and correctly concluded that the Batson decision applied to the Simmons case. Contrary to the claim of the petitioners, there is no "new rule of retroactivity" being applied by the Third Circuit in this case. Indeed, the Third Circuit's decision comports precisely with this Court's decisions in Allen, Caspari, and Griffith, and the decision certainly does not announce a new rule contrary to Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Contrary to petitioners' claim, this Third Circuit's determination will not result in "confusion and inqeuitable (sic) results." (Pb at p. 22). The Third Circuit, after a period of 15 months from the date of oral argument, wrote a thoughtful and well-reasoned opinion correctly based upon this Court's decisions. Accordingly, petitioners' writ should be denied.

B. THE THIRD CIRCUIT'S DECISION REJECTING THE STATE APPELLATE COURT'S DECISION UNDER STATE SUBSTANTIVE AND PROCEDURAL LAW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

The petitioners claim "From the State appellate court opinion, (App. H,) it seems clear that that court made a factual determination that a timely objection to the prosecutor's use of peremptory challenges was not made in this case. A federal court must afford such written findings of fact by a state appellate court a presumption of correctness." (Pb at p. 23).

Respondent disagrees with this interpretation by the petitioners, and points out that the petitioners do not give a citation to this claim. In any event, the Third Circuit correctly analyzed this issue in its opinion:

> Although the notes of the judge who presided over the voir dire, Judge Leopizzi, do not refer to a defense motion based on systematic exclusion, the file of the judge who presided over the trial and sentencing, Judge Marchese, includes the following notation: "Defense motion for mistrial charging State with systematically excluding blacks from jury. Leopizzi denied." The court clerk's records indicate that defense counsel made several motions for a mistrial before the jury was sworn, although they do not specify the grounds for these motions. Based on this record, we are satisfied that Simmons' Batson claim was preserved for appeal. (12a).

Petitioners' contention that the "respondent's failure to timely object precludes consideration of his Batson claim" (Pb at p. 24) is clearly misguided.

The Third Circuit, in addressing this issue, correctly stated "dismissing a state constitutional claim on state law

grounds does not preclude federal habeas review of a parallel federal constitutional claim." (11a). The Third Circuit cited this Court's decision in Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991) (this case is not cited in petitioners' petition). Coleman stated that this Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal questions and adequate to support the judgment. Id. at 729, 111 S.Ct. at 2553-54.

The Third Circuit, in analyzing the case sub judice under Coleman, found that the Appellate Division's judgment on Simmons' state Gilmore claim was clearly "independent" of his federal Batson claim. (9a). The Third Circuit found that the Gilmore court had explicitly based its decision "on the New Jersey Constitution, which protects fundamental rights independently of the United States Constitution." 511 A.2d at 1157. (9a to 10a).

The Third Circuit concluded, however, that

> The Appellate Division's decision "on the New Jersey Constitution, which protects fundamental rights under Gilmore, however, was not "adequate" to support its judgment. The unavailability of a state constitutional claim is not dispositive as to the availability or merits of an analogous federal constitutional claim ... (10a).

The Third Circuit properly concluded that the dismissal by the state Appellate Division of a state constitutional claim on state law grounds does not preclude federal habeas review of a parallel federal constitutional claim. (10a to 11a). Again, as

with the first issue raised by petitioners, the Third Circuit in a most well-reasoned and correct decision properly applied the cases of this Court. Accordingly, petitioners' writ should be denied.

C. THE THIRD CIRCUIT'S DECISION DID NOT HOLD THAT A BATSON PRIMA FACIE SHOWING DID NOT HAVE TO BE BORNE BY RESPONDENT; AND THE THIRD CIRCUIT'S FINDING OF A PRIMA FACIE SHOWING DOES NOT RAISE "IMPORTANT" OR "UNRESOLVED" PROBLEMS

Contrary to the claims of petitioners, the Third Circuit did hold that it was the respondent Simmons who had the burden of showing a prima facie showing of a Batson violation. As the Third Circuit clearly states in its opinion "Having asserted the claim that the prosecution based its peremptory challenges on race, Simmons had the burden of establishing a prima facie case." (13a). Respondent is at a loss to explain the petitioners' interpretation that the Third Circuit's decision does not require a petitioner to bear the burden of a Batson violation.

Contrary to the petitioners' claim, the Third Circuit clearly does require a petitioner to bear the burden, and correctly finds that the petitioner (respondent Simmons) did meet his burden (see point B, supra).

Contrary to the claims of petitioners, the Third Circuit's decision is not contrary to the principles in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), but in complete conformance. As the Third Circuit concluded:

> Although we cannot evaluate the last two Clemons factors because transcripts of the voir dire are not available, we conclude that Simmons has established a prima facie case of a Batson violation. The combination of Simmons' race, the prosecution's exclusion of at least one potential African American juror, and the circumstances surrounding the crime are sufficient to meet Simmons' prima facie burden. (15a).

It is apparent that the petitioners' contention that this issue "raises important and unresolved problems" is completely erroneous. Accordingly, petitioners' writ should be denied.

D. THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED SINCE THE THIRD CIRCUIT REACHED ITS DECISION ON AN ISSUE NOT EVEN RAISED IN THE PETITIONERS' PETITION

In the case sub judice, the Third Circuit, in addition to holding that the New Jersey appellate court's decision that Gilmore did not apply retroactively to respondent's case did not bar consideration of the Batson claim, also held that the 13-year delay between the respondent's sentencing and the direct appeal violated respondent's right to due process and a speedy appeal.

The Third Circuit, in finding that "[e]ach Barker factor indicates that the 13-year appellate delay violated Simmons' right to due process and a speedy appeal," (21a) concluded that:

> The 13-year delay in this case is an outrage, and that Simmons' appeal as of right "slipped through the cracks" is shameful. See Burkett I, 826 F.2d at 1225 (five and one-half year delay in sentencing and appeal warranted discharge); cf. Harris, 15 F.3d at 1560 (two-year appellate delay ordinarily gives rise to a presumption of inordinate delay). The subsequent period of litigation marking Simmons' efforts to obtain a direct appeal apparently took on a life of its own, without regard for fundamental notions of fairness and due process. (19a).

As the Third Circuit concluded:

> Having concluded that Simmons is entitled to relief for both his potentially meritorious, but unreviewable, Batson claim and his speedy appeal claim, we consider what relief is appropriate. (22a). (emphasis supplied).

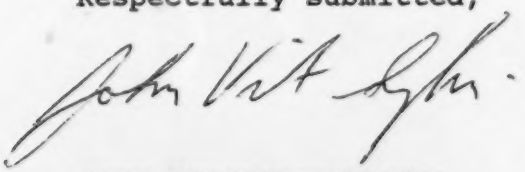
Respondent submits that there is absolutely no merit to the

three issues raised by petitioners in support of the petition for writ of certiorari. However, even assuming arguendo that this Court were to find that one of these three issues is meritorious, the fact remains that the Third Circuit also granted respondent habeas relief on the speedy appeal issue. This speedy appeal issue is not even addressed in petitioners' petition. Respondent submits that the decision of the Third Circuit on this issue is unassailable. Accordingly, the petition for writ of certiorari must be denied.

CONCLUSION

For the foregoing reasons and authorities cited, respondent Lawrence L. Simmons respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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June 6, 1995

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Washington, D.C. 20543
Attn: Kathy Tycz

Re: Howard L. Beyer and W. Cary Edwards
v. Lawrence L. Simmons
No. 94-1857

Dear Ms. Tycz:

Enclosed herein please find an original and ten (10) copies of respondent's brief in opposition to petitioners' petition for certiorari in the above-captioned matter, filed on behalf of my client, Lawrence L. Simmons (with motion for leave to proceed in forma pauperis).

Mr. Simmons was appointed appointed under the Criminal Justice ACt and is still indigent.

I certify that on this date I mailed by first-class mail two copies of the respondent's brief to my adversary, Jane E. Hendry, of the Passaic County Prosecutor's Office.

Thank you for your courtesy and cooperation in this matter.

If you have any questions, do not fail to contact this office.

Very truly yours,

John Vincent Saykanic

JVS/ms
Encl.
cc: Jane E. Hendry, Esq.
Lawrence L. Simmons

Supreme Court of the United States

No. 94-1857
Howard L. Beyer, et al.,
Petitioners
v.
Lawrence L. Simmons

ON CONSIDERATION of the motion of respondent Lawrence Simmons to expedite consideration of the petition for certiorari,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, denied.

June 26, 1995